U.S. PIRG

Comments on EPA's Examination of Whether To Develop Guidance Under the Superfund Recycling Equity Act

TO: Mr. Barry Breen
FR: Mr. Grant Cope
DT: 8/8/0

Dear Mr. Breen,

The United States Public Interest Research Group (U.S. PIRG) submits these comments on the Environmental Protection Agency's (EPA) examination of whether to issue guidance under the Superfund Recycling Equity Act (SREA). On behalf of U.S. PIRG, I would like to first thank you for the very informative, well constructed, and productive meeting on July 17. However, the tone of the meeting highlighted the need for continuing discussions on these issues and the considerable amount of care that EPA should use when drafting any guidance.

As described in Federal Register notice (65 FR 37370), the meeting had two purposes. First, the meeting was to "examine whether or not to issue guidance dealing with prospective (i.e. post-enactment) recycling transactions covered by the" SREA. Second, the meeting would specifically examine the question of "what constitutes 'reasonable care' as contemplated by sections 127(c)(5), (6) of the SREA." Consequently, these comments will address the issues.

I. EPA SHOULD DEVELOP GUIDANCE OR REGULATIONS

U.S. PIRG would support EPA's effort to draft guidance that clarifies how EPA will interpret the SREA's provisions regarding the determination of "reasonable care." We reserve judgment on the content of such guidance. However, we would object to guidance that elaborates, in any way that modifies the meaning or enhances the effect of, any provision pertaining to the SREA's conditional exemption from liability for recyclers. Such actions would amount to a modification of the underlying statutory provisions and therefore be contrary to the law.

We raise these concerns because of some statements that were made at the July 7th meeting. For instance, some participants stated that they wanted the guidance to describe the types of recyclers could be held liable and the extent of their liability. This type of guidance would violate the Administrative Procedures Act's requirements regarding public notice and comment for rulemakings. Such guidance may also be contrary to the SREA.

II. GUIDANCE SHOULD ENSURE PROTECTION FOR PUBLIC HEALTH

To be consistent with the SREA, any guidance that EPA develops on the issue of "reasonable care" should be crafted to maintain or enhance protections for public health and the environment. For example, the guidance should maintain or increase incentives to reduce the use of toxic and other material that could cause contamination. Broad liability for contamination can facilitate a

preventative, precautionary approach to using materials that may threaten human health and the environment by maintaining or increasing incentives to responsibly manage toxic and other material.[1] Extending liability to businesses that place a greater value on expediency and economic efficiency than ensuring that their actions and products protect public health and the environmental is consistent with CERCLA and the SREA.

III. THE SREA IS AN APPROPRIATIONS RIDER WITH NO LEGISLATIVE HISTORY

EPA should not use the information that Sen. Lott (R-MS) introduced into the Congressional Record as "legislative history" for guidance.[2] The SREA was passed as a legislative rider on an unrelated omnibus appropriations bill.[3] Congress introduced the SREA in November of 1999, but then held no hearings, markups, or debates over this bill before passing it as a rider on an unrelated appropriations bill. Therefore there is no clear expression of legislative history that EPA or the courts can use to interpret the SREA's provisions. A recent court decision concurs with this analysis. United States v. Atlas Lederer Co., Case No. C-3-91-309 (S.D. OH 2000).

Sen. Lott's (R-MS) unsuccessful attempt at creating legislative history contradicts the intent of other Senators that sponsored the bill. For example, Senator Daschle (D-SD) disassociated himself from the information that Sen. Lott (R-MS) characterized as being legislative history. 146 Cong. Rec. S76-02 (Jan. 26, 2000). Importantly, Sens. Lott and Daschle are the two original sponsors of the SREA. 146 Cong. Rec. S76-02 (Jan. 26, 2000). Additionally, remarks, which Sen. Lott characterized as "legislative history", were simply incorrect. See Atlas, at 6 (noting that statements in the legislative history did not make the correct distinction between "actions" and "claims"). The lack of a committee vetting process that should inform and clarify congressional intent and root out such inaccuracies also calls into question the adequacy of the supposed legislative history. Consequently, the SREA should be interpreted using the usual tools of statutory construction; the primary tool therefore being the plain language of the statute.

IV. THE SCOPE OF INQUIRY UNDER "REASONABLE CARE" STANDARD IN SECTION 127 (C)(5) AND (6)

A. The Scope Of The Inquiry Criteria Under The "Reasonable Care" Standard Extends To A Consuming Facility's General Status Of Compliance With Environmental Laws And Its Compliance with Laws Specific To The Recycler's Recyclable Material

The SREA affords recyclers of certain recyclable material a conditional exemption if they can meet five elements. The fifth element requires that recyclers use "reasonable care" to determine

[1] Environmental Protection Agency, Region 9, Retroactive Liability (downloaded at http://www.epa.gov/region09/waste/sfund/liabile.html on Feb. 2, 2000); and Lois J. Schiffer, Keep Superfund Liability Intact, 12 The Environmental Forum 5, 26-28 (1995). American Law Institute, Restatement of the Law (Second) of Torts, §§ 875-886B (1977); and Steven Singer, Note, An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries, 12 Rutgers L.J. 117 (1980).

[2] Contained in S.15048 (Nov. 19, 1999).

[3] An act making consolidated appropriations for the fiscal year ending September 30, 2000, and for other purposes. (H.R. 3494, § 6001 et seq.) Signed into law on Nov. 29, 1999 (Public Law 106-113).

whether a consuming facility is in compliance with certain environmental laws. The SREA's definition of "reasonable care" has three criteria. SREA § 127(C)(6)(A)-(C). The second criteria requires that the recycler undertake certain efforts to ascertain if the consuming facility's general operations comply with environmental laws. SREA § 127(C)(6)(B). Under the third criteria, recyclers must inquire of government agencies about a consuming facility's past and current compliance status with environmental laws. SREA § 127(C)(6)(C).

The criteria for getting the reasonable care standard are very clear. Recyclers must simply determine whether a consuming facility has complied and is complying with environmental laws, from the time the recyclers bring their recyclable material into the consuming facility, to the point at which the consuming facility sells the material or produces another product with the material. The plain language, tenses of the relevant terms, and the SREA's use of the phrases "the recyclable material" and "recyclable material" supports this interpretation.

1) Recyclers Must Inquire About A Consuming Facility's General Status Of Compliance With Environmental Laws Throughout The Process of Recycling

Section § 127(C)(5) of the SREA requires recyclers to inquire about a consuming facility's general status of compliance with environmental laws. Specifically, the recycler must have

> exercised reasonable care to determine that the facility where the recycling material was handled, processed, reclaimed, or otherwise managed by another person (hereinafter in this section referred to as a 'consuming facility') was in compliance with substantive (not procedural or administrative provisions of any Federal, State, or local environmental law or regulations, or compliance order or decree issued thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated <u>with recyclable material</u>.

(emphasis added) The SREA's definition of "recyclable material" contained in § 127(b) makes clear that this term relates to a range of substances, not any one particular material. This means that recyclers must use reasonable care to determine the consuming facility's general compliance (past and current) with environmental laws for those types of substances.

The SREA's use of the past tense to describe the relevant actions and determination ("handled, processed, reclaimed or otherwise managed" and "was in compliance with") means that recyclers have a duty to make this determination throughout the time that they do business with a particular consuming facility. § 127(c)(5). Recyclers could only undertake this inquiry during and after the consuming facility's management of the recyclable material; from the time that the recyclers give the consuming facility the recyclable material, to the time that the consuming facility sells the recyclable material to another business or processes it into another product.

Importantly, the SREA elaborates on this duty in later provisions with distinct requirements that the recycler inquire about whether the consuming facility is conducting business in an environmentally responsible fashion and whether the facility complies with specific environmental laws applicable to the recyclable material sold by the recycler.

2) The SREA's Plain Language Requires Two Distinct Inquiries

Specifically, the second and third criteria of the "reasonable care" standard create two distinct inquires. The first criteria is tied to the recycler's "ability [] to detect the nature of the consuming facility's operations [] associated with recyclable material." § 127(c)(6)(B). The second criteria requires the recycler to inquire about the consuming facility's "past and current compliance with [] management activities associated with the recyclable material." § 127(c)(6)(C).

The SREA's distinction between "recyclable material" and "the recyclable material" is critical to understanding the required scope of the inquiry under the "reasonable care" standard. When the SREA uses "recyclable material", it is describing the general and specific actions that recyclers must take to determine whether a consuming facility's operations are in compliance with certain laws. When the SREA uses "the recyclable material", the phrase pertains to requirements that are relevant for a particular shipment of recyclable material and whether the actions relevant to that shipment meet the SREA's criteria. Therefore, the SREA's distinct use of "the recyclable material" and "recyclable material" illuminates the scope of the reasonable care standard.

a) "The Recyclable Material"

All of the SREA's provisions that contain "the recyclable material" pertain to criteria that are relevant to a particular shipment of recyclable material. For example, section 127(c)(1) states, "the recyclable material" must meet a commercial specification. Section 127(c)(2) states, a market must exist for "the recyclable material." Section 127(c)(3) states, a substantial portion of "the recyclable material" must be made available for use as feedstock of the manufacture of a new saleable product. Finally, section 127(c)(4) states, "the recyclable material could have been a replacement or substitute for a virgin raw material." All of the provisions directly pertain to a recycler's particular shipment of recyclable material.

Using this analysis, the recycler must inquire about the consuming facility's compliance with environmental laws as they apply to the consuming facility's management of the recyclable material sold to it by the recycler.[4] The SREA generally requires that recyclers use "reasonable care" to determine the consuming facility's compliance status with environmental laws applicable to "activities associated with recyclable material." §127(c)(5). The SREA's third criteria that defines "reasonable care" requires recyclers to make inquires regarding the consuming facility's past and current compliance with environmental laws "associated with the recyclable material." § 127(c)(6)(C) (emphasis added). Consistent with the SREA's use of this phrase, recyclers must inquire about a facility's compliance status with environmental laws that pertain to the recyclable material that the recycler sold to the consuming facility.

[4] The SREA's reasonable care standard is determined using criteria that "include (but are not limited to) – [] (C) the result of inquires made to the appropriate Federal, State, or local environmental agency (or agencies) regarding the consuming facility's past and current compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation [] applicable to the handling, processing, reclamation, storage or other management activities associated with the recyclable material. For the purposes of this paragraph, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activity associated with the recyclable materials shall be deemed to be a substantive standard." §127(c)(6)(C).

This interpretation is buttressed by the SREA's second use of the phrase in this provision, which states that "a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activity associated with the recyclable materials shall be deemed to be a substantive provision." § 127(c)(6)(C) (emphasis added). Consuming facilities need different types of permits for different types of recyclable material. Therefore, this phrase clearly means that recyclers must inquire about whether the consuming facility has obtained all applicable permits for the recyclable material that the recycler sold to the consuming facility.

b) "Recyclable Material"

In contrast, the second criterion that defines "reasonable care" is tied to the recycler's "ability [] to detect the nature of the consuming facility's operations concerning [] management operations associated with recyclable material. § 127(c)(6)(B) (emphasis added). Recyclers have the ability to detect a facility's operations through a broad array of actions, including visual site inspections, presenting the consuming facility with questionnaires, making inquires of business partners, searching trade publications, and through other actions (e.g. see Section D infra). These actions should all be required through guidance. Because the SREA uses the phrase "recyclable material", guidance should ensure these actions extend to the consuming facility's compliance with environmental laws in general. Many factors can also inform this inquiry, including a facility's past history of non-compliance, bad businesses practices (e.g. worker safety and neighborhood complaints), bankruptcies, and other factors. Likewise, guidance should make these factors relevant.

3) Broad Scope Of Inquiry Is Consistent With The Purpose Of The SREA And CERCLA

The purpose of the SREA is to promote recycling through furthering "the goals of waste minimization and natural resource conservation while protecting human health and the environment." §2(1). A scope of inquire that extends from the time the recyclable material enters a consuming facility to the point at which the consuming facility sells the material or produces another product with the material accomplishes these goals. For example, the market costs of complying with protections for human health and the environment provide a price incentive to minimize waste and conserve natural resources. Businesses are also more likely to minimize their use of virgin resources if consuming facilities purchase products at a price that reflects the costs of complying with such protections. Likewise, competition within the market of consuming facilities will ensure that those facilities that are best able to internalize the costs of complying with such protections offer the best prices for recyclable materials, thereby minimizing waste and conserving natural resources. Additionally, if recyclers sell their recyclable material to consuming facilities that are in full compliance with such protections, then there is less chance such transactions will result in contamination.

4) Conclusion: The SREA's Use Of Two Different Phrases Creates A Duty For The Recycler To Determine A Consuming Facility's General Compliance With Environmental Laws And Laws That Relate To The Recyclable Material Sold To The Consuming Facility

The SREA requires recyclers to undertake two distinct inquiries to qualify for the SREA's conditional exemption from liability. First, the recycler must use reasonable care to determine

whether a consuming facility is generally complying with environmental laws associated with recyclable material. Included in this determination is the requirement that a recycler thoroughly exercises its ability to determine whether the consuming facility is operating in an environmentally sound fashion. Second, the recycler must make a determination regarding the consuming facility's compliance with laws associated with the specific recyclable material that the recycler sold to the consuming facility. The SREA use of the past tense in §127(c)(5) (e.g. "was in compliance" and "handled, processed, reclaimed, or otherwise managed") also makes clear that the scope of the inquiry extends to all phrases of the consuming facility's management of the recyclable material that the recycler sold to the consuming facility.

V. RECYCLERS MUST DETERMINE COMPLIANCE WITH A VARIETY OF ENVIRONMENTAL LAWS

A. The Plain Language And Purpose Of The SREA Supports A Broad Interpretation

The SREA requires that recyclers exercise reasonable care to determine that a consuming facility "was in compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation [] associated with recyclable material." § 127(c)(5). (emphasis added). EPA's interpretation of this provision should be consistent the broad scope of the underlined terms by requiring that recyclers use reasonable care to determine a consuming facility's compliance with a wide variety of environmental laws. A broad interpretation is consistent with the SREA's use of the word "any", in reference to Federal, State, or local laws; there is hardly a more inclusive term. The SREA's use of the inclusive phrase "associated with", in reference to "recyclable material" (a broad phrase within the context of the SREA), also militates in favor an expansive set of laws.

B. Policy Concerns Favor A Broad Interpretation

A broad interpretation provides incentives to comply with baseline Federal protections, or more protective State or local laws. This is consistent with the purpose of SREA, which is to promote recycling "while protecting human health and the environment." § 2(1). To interpret the provision otherwise (e.g. through interpreting "or" to be an exclusive term) would mean that EPA could unilaterally preempt one sovereign's law in lieu of another. Congress did not clearly express its intent to preempt State or local laws that are more protective than Federal law. Therefore, EPA should include all three types of laws within recycler's scope of inquiry.

C. The SREA's Use Of Key Terms And The Plain Language Of Those Terms Require Recyclers To Inquire About Laws That Include, But Are Not Limited To, CERCLA

The EPA should not interpret the SREA's use the term "substantive" law to preclude laws other than CERLCA. This interpretation would be contrary to the plain meaning of the terms, "substantive", "procedural", and "administrative". Additionally, the SREA's juxtaposition of the term "substantive" with the phrase "procedural or administrative" illuminates the relevant "provisions" of law that apply under § 127(c)(5).

1) Substantive Law

The plain meaning of "substantive law" is "law which creates, defines, and regulates rights and duties of parties, as opposed to 'adjective, procedural, or remedial law,' which prescribes method of enforcing the rights or obtaining redress for their invasion." Blacks Law Dictionary, 1429 (1990) (emphasis added). Therefore, any provision of Federal, State or local law that creates, defines, and regulates rights and duties that pertain to recyclable material are relevant under § 127(c)(5).

2) Procedural Law

The plain meaning of procedural law is "that which prescribes method of enforcing rights or obtaining redress for this invasion, [] machinery for carrying on procedural aspects of [legal] action, [] [laws] which merely prescribe the manner in which [substantive] rights and responsibilities may be exercised and enforced in a court are 'procedural laws.'" Blacks Law Dictionary, 1203 (1990) (emphasis added). "The law of procedure is commonly termed by jurists [as] 'adjective law." Blacks Law Dictionary, 1204 (1990). The definition of "adjective law" also supports a narrow interpretation of the term "procedure." Adjective law means "the aggregate of rules of procedure or practice. [It] [p]ertains to and prescribes practice, method, procedure or legal machinery by which substantive law is enforced or made effective." Blacks Law Dictionary, 41 (1990) (emphasis added). This also supports a narrow interpretation of phrase "procedural law." Given this analysis, it is clear that the phrase procedural or administrative provisions apply only to mechanistic actions devoid of discretion, actions done merely as a matter of course, and which have no impact on the rights and duties of individuals and businesses under environmental laws.

3) Administrative Law

The plain meaning of term "administrative", and the SREA's placement of the term in conjunction with the term "procedure", also supports this analysis. "Administrative" means, "having the character of executive or ministerial action." Blacks Law Dictionary, 45 (1990). "Ministerial act" means, "that which involves obedience to instructions, but demands no special discretion, judgment, or skill. [] An act is 'ministerial' when its performance is positively commanded and so plainly prescribed as to be free from doubt." Blacks Law Dictionary, 996 (1990). This definition clearly applies to only insignificant actions.

4) Conclusion

Given the definition of the terms and their juxtaposition within the SREA, it is clear that such actions as filing, reporting, and record keeping requirements do not qualify as procedural law under certain statutes. For example, if an entity regulated under the Resource Conservation and Recovery Act (42 U.S.C § 6901 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), or the Toxic Substances Release Inventory (42 U.S.C. § 11001 et seq.) fails to monitor, report, or retain information as required under those statutes, their failure would be a violation of substantive law because it could adversely impact enforcement actions, protections for public health or environmental quality, and the public's right to know about chemicals in their community.

D. Reasonable Care Should Incorporate The "Due Diligence" And "Know Or Should Have Known" Standards

The SREA's inquiry criteria should be judged on a standard of whether recyclers or their agents knew or should have known that the consuming facility was managing their operations in an environmentally irresponsible fashion. At a minimum, they should be held to the exercise of due diligence in meeting this standard. This balanced construct provides baseline protections for both responsible recyclers and public health and the environment.

The plain language of the SREA supports the use of this construct. Under the SREA, whether a recycler exercised "reasonable care" depends on the recycler's ability to detect a consuming facility's current management activities associated with recyclable material.[5] If a recycler has the ability, but consciously or through lack of due diligence, fails to detect environmentally unsound business operations, then they have not met one of the SREA's criteria that define the reasonable care standard. Also, CERCLA is a statute that protects public health; therefore exemptions from its provisions should retain incentives to fully comply with its protections.

VI. Recyclers Can Meet The SREA's Reasonable Care Standard Through A Variety Of Practical Actions

Recyclers have the ability to undertake numerous common sense actions to determine the compliance status of a consuming facility. Contracting is the primary action that defines the relationship between recyclers and consuming facility. Recyclers have the ability to contract for require a wide variety of conditions to meet the "reasonable care" standard. Likewise, consuming facilities can meet these conditions as part of running an environmentally responsible business.

A. Certified Statements of Compliance

Recyclers can contract for a statement by consuming facilities that they are in compliance with all applicable legal requirements. Recyclers should get one statement prior to signing any contract for the delivery of recyclable material that specifies that the facility is in general compliance with applicable legal requirements. Recyclers should get another statement after the facility sells the recyclable material, or produces another product with the material, that all actions associated with the material were conducted in compliance with applicable laws. To ensure objectivity, and provide a safeguard for public health and the environment, this statement should be prepared by an independent auditor that does a thorough assessment of the facility's compliance with any applicable Federal, State, or local law.

B. Adjustment of Management Practices

The costs of this action may be prohibitive for small shipments of recycled material. Importantly, recyclers also have the ability to adjust their management practices and simply store small shipments until contracting can be conducted using reasonable care. While some smaller

[5] Section 127(c)(6)(B) of the SREA uses the present tense when describing the consuming facility's actions that the recycler may have the ability to detect.

recyclers may not be able to comply with this standard, the SREA contains no variance for small businesses in meeting the reasonable care standard. As with any industry, some minor corrections should be expected as the recycling industry adjusts to new market conditions that value environmentally responsible management practices.

C. Site assessments

Recyclers or their agents should also have the ability to require a site assessment as a condition of their contract. Some may argue that this condition should only pertain to a consuming facility that has already violated the law. However, a preventative approach that may preclude problems both provides incentives to conduct business in an environmentally responsible fashion and makes good business sense (i.e. as a protection against liability for recyclers).

D. Databases

Importantly, EPA should allow recyclers to use government databases as a tool for determining a company's history of noncompliance. However, these databases should not provide a surrogate for any final determination. While EPA is working hard at regularly updating and controlling the quality of information contained in these databases, many EPA databases contain errors or outdated information.[6] Therefore, a recycler or its agent should have to obtain the relevant information from the appropriate Federal, State, or local agency prior to entering in a contract with a consuming facility.

E. Updates By The Consuming Facility

If a recycler or its agent enters into a long-term contract with a consuming facility, they the recycler should have the duty to recheck the compliance status tri-annually. The recycler also has the ability to ensure that any contract is predicated upon the consuming facility telling the recycler of any notice of violation on a tri-annual basis, and any conviction, judgment, order, or settlement immediately upon the finalization of the document.

U.S. PIRG thanks EPA for the opportunity to comment on these issues. If you have any questions concerning these comments, please do not hesitate to contact me.

Sincerely,

Grant Cope

[6] For example, the author of these comments went to EPA's Integrated Data for Enforcement Analysis system (IDEA) website (http://es.epa.gov/oeca/idea/). This site is a "comprehensive single-source of environmental performance on regulated facilities within EPA." However, the website stated, "The data in IDEA are regularly refreshed when OECA makes new copies of the source data systems. It is important to keep in mind that the data accessed in IDEA are only as current as most recent refresh date." The Database Update Status (http://es.epa.gov'oeca/idea/update.html) webpage showed that some databases had not been updated in over two years.